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A COMPARATIVE CASE STUDY OF SELECTED PHASES OF LAW FOR THE DENTIST*

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IN the preface to his work entitled "Dental Jurisprudence," published in 1892, Dr. Wm. F. Rehfuss makes the following observation: "Owing to the wonderful advancement within late years of the dental sciences, embracing the discovery of many new operations and methods of treatment, increased responsibilities are accredited to the dental surgeon, the neglect of which might involve him in litigation, and the knowledge thereof may at some period in his professional career avoid a calamity of a serious nature. For this reason, a knowledge of dental jurisprudence would be of infinite value to the young graduate (and may we add, to the old and seasoned practitioner as well) who too frequently enters upon his professional duties utterly ignorant and oblivious of the legal responsibilities incident to the practice of his profession. An error of judgment, recklessness, a careless mistake, or unprofessional conduct may involve him in unwonted trouble that might ruin his whole professional career."

Thirty-five years later, Elmer D. Brothers in the introduction to his second edition of the same subject says in substance as follows:

"Every man should be broader than his calling. The time has passed when the practitioner in any profession may rest content with a knowledge of those things which pertain only to his profession. This proposition applies with special emphasis when the law, to which as a practitioner, he is ever amenable, is the subject involved. In fact such law is an essential and inherent element of his profession, because with such knowledge he is better able to discharge the legal duties and responsibilities inseparable from his activities."

We are in absolute accord with the views herewith set forth, and on this occasion shall endeavor to present for consideration and enlightenment, as our subject indicates, a study of a few adjudicated cases illustrative of a few chosen phases of law for the dentist. The discussion is not designed to prepare any one of us for the practice of law, but by spending a little while from time to time in such studies as this, we may become better dentists and citizens by being enabled to discharge our special duties with intelligent foresight and to measure our rights by the accumulated experience of the ages. Instead of attempting

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to cover in harem-scarem fashion the whole broad field of Dental Jurisprudence, we are submitting, we hope, a fairly exhaustive consideration of chosen subdivisions of the subject; and instead of a long drawn out recitation of abstract principles of law we have chosen to bring to your consideration some well settled concrete cases illustrating the application of abstract principles of law.

The subdivisions which we have chosen are as follows:

The *over-lapping of medical and dental practice*; the *value of oral peculiarities and dental records in the identification of persons before and after death*; *the ever present elements of skill, care and judgment*; *malpractice and its various variations*; and *some selected miscellaneous considerations.*

While some of the citations and references are to cases involving the practice of the physician and surgeon they will be found to apply by analogy to dental practice; and may we explain that the great majority of these cited cases have gone upon appeal to courts of superior jurisdiction, so that the decisions quoted represent established precedents in the respective cases.

Now our first consideration will be the legal limitations on dental practice or the over-lapping of dental practice into the practice of medicine. Very often the question may arise as to how far the dentist may go in his practice without being chargeable with practicing medicine without a license. This is particularly true where a dentist is specializing in oral surgery. On this particular point, there seems to be little authority or opinion. So far I have found only one case in point. It was cited by Childs in the October Cosmos 1922, and is entitled "In Re Carpenter, 196 Mich. 561. The case was an incurable cancer of the mouth which was treated by the dentist in consultation with, and under the direction of the attending physician. The service by the dentist involved treating and cleansing the cancer daily for several months and the use of cocain and various antiseptics. The fee amounted to $358.00, a part of which had been paid and upon death of the patient, the dentist sued the estate for the unpaid balance of $138.00. The estate refused payment on the grounds that the dentist was practicing medicine without a license. The lower court allowed the claim and the higher court in affirming the award said in substance as follows: "We are of the opinion that claimant is entitled to recover upon either of two theories: First, that the services were those of a nurse under the direction of a surgeon; and, second, that the treatments given by the dentist were clearly such as he was authorized to give as a duly licensed and qualified dentist. Now while this case was decided in the light of the Michigan State Statute, its holding should be of general

interest to the dental profession as tending to establish a precedent for future guidance.

Now in this same connection it may be said that some dentists still doubt their legal right to treat cases by internal medication. This belief should be corrected as it depends largely on their ability. In treating highly nervous patients a sedative may be necessary and there are many cases requiring nerve stimulation. Painful conditions often require internal medication even to the point of prescribing narcotics. A dentist certainly might be held responsible for neglect in failing to use internal treatment where required. Of course, he is not expected to prescribe remedies unless he is thoroughly conversant with their effects and their proper mode of administration.

And now, we come to the other side of the question, the right of the physician and surgeon to practice dentistry by virtue of his license as a general practitioner. This is a question of interest to both professions. And in this connection it may be broadly stated that in the absence of a statute to the contrary, the general medical practitioner has a legal right to practice dentistry. This on the ground that dentistry is a branch of medicine, and a license to practice the latter includes the former. There is a growing tendency, however, towards a change by legislative enactments making dentistry a separate calling. In most states we have separate statutes, one regulating the practice of medicine and the other regulating the practice of dentistry. Where such dental acts do not expressly except physicians from their operation (which they do however in many states) some difficulty often arises in determining the right of the physician to practice dentistry by virtue of his license as a general practitioner.

The question has been passed upon in a number of cases and the decisions are not in accord. Some have held one way and some the other, and the reasoning of the courts may be perhaps best illustrated by a review of a case from each class. As an example of a holding that a general license to practice medicine also covers the practice of dentistry, a Rhode Island case adjudicated in 1899 will serve. The title to this case is *State* v. *Beck,* 21 R.I. 288; or 43 Atl. 366. In this case the dental act of Rhode Island enacted in 1888 antedated the medicinal act by seven years, and the dental act did not exclude physicians from its provision, nor exempt them from its restriction.

Indictment was brought in 1899 against one Horace P. Beck, a physician, charging him with practicing dentistry without a license. His plea was, of course, that by virtue of his qualification to practice medicine he was qualified to practice it in all its branches upon all parts of the human body, including the teeth. After much profound

discussion, the plea was sustained. A great many state dental statutes were referred to which excepted physicians and surgeons and in view of all precedents considered, it was held that this special dental act could not be interpreted to apply to licensed medical practitioners.

This brings us to the consideration of that class of cases in which it was held that license to practice medicine and surgery did not confer the right to practice dentistry. The case of *State* v. *Taylor,* 106 Minn. 218; (118 N.W. 1012), will be considered. This case came to trial in 1908 and the facts involved are substantially as follows: Dr. Taylor, a physician was convicted of practicing dentistry without a license, in violation of the 1907 State Dental Act and he appealed his case. He was a licensed physician and claimed that such license entitled him to practice dentistry on his own patients. He extracted two teeth and took impressions and had dentures constructed and delivered them and collected a fee. It was conceded that he did not have a certificate from the State Board of Dental Examiners. The court of appeals affirmed the conviction of the lower court and in its reasoning among many other things said: "It is true as defendant contends that the practice of medicine and surgery in a broad and comprehensive sense includes the practice of dentistry which is medical, surgical, or prosthetic. In so far as it is a direction of medical science to the prevention, modification, or removal by medical, and hygienic remedies of the causes and effects of disease in the dental organs, it forms a part of the physician's practice, just as does the treatment of cerebral, cardiac, or pulmonary diseases. In so far as it is an application of surgical skill to the fractures or to staphyloraphy, it is simply oral surgery, involving only such knowledge and skill in the use of instruments as every surgeon must possess. In the absence of legislation a certificate authorizing one to practice medicine and surgery would therefore entitle him to practice dentistry.

For reasons of public policy, however, this legislature has sought to divide the field of medicine and surgery and make a separate profession of a part thereof. (Read *St.* v. *Vondersluis,* 42 Minn. 129 or 43 N.W. 789.) It was thought that men who engage in treatment of dental organs should receive special preparation on and be specially licensed to practice that branch of medicine and surgery. A Board of Dental Examiners was created and authorized to examine and determine who should practice dentistry in this state. A department of Dental surgery was established at the State University, awarding a special degree. An examination of the course shows that it includes, besides a considerable part of the work required of medical students also those subjects which relate particularly to diseases of dental organs

and others designed to insure efficiency in the mechanical phase of the treatment and restoration. The dental statute provides that: "No person shall practice dentistry in the state without having complied with this law."

The court further had to say that since the legislature had defined both the practice of medicine and the practice of dentistry and made the two distinct professions, and that the dental statute did not except physicians by expression or implication it would conclude that the intention was to require the physician to qualify as a dental practitioner if he desired to practice dentistry.

We submit the two foregoing cases as a fair cross-section of the case law on this subject, and it is obvious from their holdings that as cases of this kind must be considered in the light of state statutes, the subject cannot be covered by any hard and fast rule. However, generally speaking, in the absence of contrary statute one holding a license to practice medicine will also have the right to practice dentistry. And, where dental state laws except physicians from their operation, the physician of course can legally practice dentistry. In the states however, where the practice of dentistry has been made a separate profession from medicine and physicians and surgeons have not been excepted, the court decisions construing the law are not in accord. It must be stated with emphasis, however, that a physician practicing dentistry under any condition must comply with the requirements as to skill, care and judgment.

And now may we invite you to consider with us, the value and importance of the records of the dentist and his expert testimony, in criminal investigation, in identifying persons dead or alive. I am of the opinion that in recent years, dental educators, and consequently dental students and practitioners have failed to place proper emphasis on this phase of professional training and practice. I am sure this matter is readily emphasized to us when we consider the recent attitude of the Federal Department of Justice in taking steps to cooperate with organized dentistry in standardizing dental records as a means of aiding materially in criminal investigation.

The authorities are in accord: That the teeth are among the last parts of the body to decompose, and, therefore since no two mouths are exactly alike the teeth and jaws furnish good and sometimes indisputable means of identifying a skeleton or corpse.

Criminal reports abound of instances in which the oral organs were important factors in determining the identity of a person or a body. Cases of doubtful identity have frequently been settled by casts of

the mouth taken before death by the dentist. In this connection many questions, intricate and speculative may arise relative to conditions observed, and if called upon to make investigation, it should be made with a view to obtaining satisfactory data for an opinion on any subject which may be reasonably anticipated. Whether missing teeth in a corpse or skeleton were lost before or after death; if before, how long; the cause of a certain condition observed or whether such a condition could have been produced by such and such means, or is the result of disease, or existed prior to death, or was caused by death; these and numberless other questions should claim the attention of the dentist as an investigator.

Dr. Rehfuss, an early writer on the subject, and whom we have consulted closely in this study, cites a number of cases of mistaken, doubtful, and disputed identity that were settled by means of expert dental testimony. However, we shall take time to bring to your attention only two cases illustrating the importance of the subject under consideration. The first occurred in London, and is a most singular case of disputed identity, in which there was between two persons such a similarity of name, time, place, age, occupation, and circumstances as for a long time utterly to perplex investigation.

The body of a woman supposed to have been murdered was missing and another woman was arrested on suspicion of having committed the crime and sold the victim's body for dissection. Both direct and circumstantial evidence brought the crime home to the suspect. The day after the alleged murder, an old woman of the description of the supposed deceased was found with a fractured thigh lying exhausted on the street. Her name was Caroline Walsh and she said she was from Ireland. She died and was buried from the London Hospital. The missing woman was named Caroline Walsh, and she was also Irish. The prisoner, Elizabeth Ross, insisted that this was the missing woman whom she was accused of having murdered. Various points of difference were established by a number of witnesses, but the chief distinction was, that while the missing woman had very perfect incisor teeth (a remarkable and noticeable circumstance for her age, eighty-four), the other one who had died at the hospital had no front teeth and the sockets corresponding to them had been obliterated by time. The non-identity was further confirmed by relatives of the missing woman.

Perhaps one of the most interesting cases in the annals of criminal jurisprudence, is the Webster-Parkman trial which occurred in Massachusetts. The following is a brief resume of the case: On November 24, 1849, Dr. George Parkman, a wealthy and well known resident disappeared. He was last seen at the Medical College of Harvard

University, in the company of the Professor of Chemistry, Dr. John W. Webster, his friend and protege. A week after his disappearance, portions of human remains were found in a vault in Dr. Webster's laboratory; other parts were found in a tea-chest, while in a furnace were also pieces of human bones. Among the ashes, about 175 grains of gold were discovered; also a lower tooth, with a cavity in it once filled by a dental operation, three blocks of mineral teeth with rivets, but without the gold plates and a great many fragments of bone belonging to the skull and lower jaw. The bones and teeth appeared to have been exposed to intense heat. By ordinary medical experts, identification of these mutilated remains with that degree of certainty required by criminal law was impractical. Dr. Nathan Keep a celebrated New England dentist, however, not only identified the burned and mutilated jaw and teeth as those of Dr. Parkman in a manner which amounted to a demonstration, but also, from the melting and chemical effects produced, was enabled to say what had been the means employed in the partial destruction. The remains thus being identified, and other evidence pointing so conclusively to Professor Webster as the murderer, the jury reached a verdict of guilty on the eleventh day of the trial. Dr. Webster eventually confessed the crime and paid the extreme penalty. The confession verified the particulars given by the dental experts. The case is cited in the American System of Dentistry, in Wharton's Jurisprudence and is reported at length in the current issue of Oral Hygiene under the title "A Celebrated Denture." Dr. Dunn's appropriate opening paragraph to the article in Oral Hygiene is quoted as follows: The artificial teeth of Dr. George Parkman spoke louder than a thousand tongues. They told a scalp-tingling tale of horror. Upon them hinged the solution of an amazing murder, the identity of the victim and the guilt of the perpetrator." Interest in this case may be heightened by considering the prominent social and professional status of the men involved. Dr. Parkman, the victim, had been instrumental in erecting the Medical School building at Harvard; Dr. Oliver Wendell Holmes, an important witness was Parkman Professor of Anatomy and Physiology, and was a friend of Dr. Parkman and a colleague of the murderer. Dr. Wm. T. G. Morton, a dentist, famous for his general anesthetic achievements a few years previous was another witness. Dr. John W. Webster, Professor of Chemistry in the medical school was one of the chief figures in the case. The premier witness was Dr. Nathan C. Keep, the dentist of Dr. Parkman. Dr. Keep later was a moving spirit in establishing the College of Dentistry at Harvard University.

MALPRACTICE

And now as we come to the consideration of Malpractice and a few of the many complexing problems that may confront us in connection therewith, we feel that we have reached the most important phase of the presentation. The term "Malpractice" is variously defined by the writers on the subject. Rehfuss defines it as "bad or unskilled practice in a dental surgeon, whereby an unskillful operation is performed, the health of the patient injured or his life destroyed by the improper and careless administration of medicines." A very concise definition of the term is given by Brothers, as, "Improper treatment of a patient by a dentist whereby the patient is injured." From Black's Law Dictionary (2nd Ed.) page 751, we quote a more comprehensive and inclusive definition of the term Malpractice: "Bad, wrong, or injudicious treatment of a patient professionally and in respect to the particular disease or injury, resulting in injury, unnecessary suffering or death to the patient, and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent." Notwithstanding the various definitions, the authorities are generally agreed that to constitute malpractice in legal contemplation, the two essentials, (a) improper treatment and, (b) injury there from must be shown. These essentials must coexist in the relation of cause and effect and not as a mere coincidence. Noyes states very clearly that, "injury to the patient is an essential feature of legal malpractice." He says, that no matter how unskilful, incompetent, or careless a dentist may be, he is not guilty of malpractice from a legal point of view unless the patient suffers injury." He further observes however, that, "unskillful, incompetent, or negligent operating usually does injure the patient." The point is that in suits for malpractice the injury must be affirmatively proven and also the neglect or failure of professional duty. In discussing malpractice repeated reference must be made to the time worn terms, skill, care, and judgment as malpractice suits are usually based upon a default in one or more of these elements. As a rule either ignorance, carelessness, or bad judgment is alleged and sought to be shown. Many cases cited as said before will involve the general practice of medicine and surgery but by anaology the illustrations of the law are applicable to dental practice.

THE BASIS FOR LIABILITY

The basis for liability for malpractice rests on the duty owed the patient by the practitioner. So if the relation of dentist and patient has not been established, no liability can be incurred. Therefore a dentist is not liable for malpractice in refusing to treat a patient, not-

withstanding the urgency of the case and the unavailability of another dentist. This point of law is clearly and definitely stated in court opinions in a number of cases, but the case of *Hurly* v. *Eddingfield,* 156 Ind. 416 (1900) while an extreme one should illustrate sufficiently this point. The abbreviated facts are as follows: A patient, who was very ill sent for Dr. Eddingfield who had been the family physician, and the messenger explained the urgency involved and that no other aid was available and tendered the fee. The doctor was not busy but refused to go. The patient died supposedly for want of attention that the doctor might have given, and the legal representative sued "for $10,000 damages in wrongfully causing the death of the deceased." The trial court dismissed the suit and on appeal, the supreme court of the state affirmed the lower court. The opinion in short was, that a physician is under no obligation to accept and treat a patient, that the license of the state to practice medicine is permissive and not compulsory. Time will not permit the citing of the many other references on this same point. Wharton, on "Negligence," Paragraph 731, says, however, as to the common law requirement in this connection, that "no question can exist as to legal right of a physician (and by same token a dentist) unless he be an officer of the government charged with specific duties which he thereby violates, to decline to take charge of a particular case.

So it seems to be a well established legal certainty that a physician or a dentist may refuse treatment to a patient for any cause or for no cause except his own personal whim. If, however, a patient is accepted and treatment is begun or promised, it must be continued unless the doctor is dismissed by the patient, or unless he gives notice to the patient that he will discontinue services and gives sufficient time to procure other services.

LACK OF SKILL OR CARE GIVING RISE TO LIABILITY

The courts are not entirely agreed as to the degree of skill and care a dentist and a physician must use to escape liability for injury to a patient. All do hold, however, that the professional man is not required to possess and to use the highest degree of these elements possible. It is generally agreed also that a patient does not have to prove grosss negligence on the part of the practitioner in order to recover for malpractice. The negligence which renders a dentist liable in a malpractice suit is simply a failure to perform the duty which he as a professional man owes his patient. That duty may be expressed thusly: That degree of skill, care and learning ordinarily possessed and exer-

cised by members of his profession in good standing practicing in similar localities.

The case of Simonds v. Henry illustrates very clearly the law in this connection.

Simonds v. *Henry,* 39 Maine 155 (1855) illustrates the degree of skill, care and judgment required of the dentist in the manufacture and fitting of artificial teeth. Dentures were made for wife of defendant. When put in the mouth she complained that they felt odd and pained her. The plates were filed but still she complained and declined to pay for them. It was agreed that she take them away and try them and return on a set day following. When she returned, she said she knew she could never wear them, etc., and left the dentures without paying for them. The dentist sued for the fee agreed upon. The evidence was conflicting as to the quality of service and fit of the dentures. One witness testified that they were a good piece of work, another that they were fairly average, and a third that they were nothing extra. Among other things the jury was instructed that if the dentist had used *all* the knowledge and skill to which the art had advanced at that time, that would be all that could be required of him; that they should determine from the evidence whether the dentures were properly made and fitted. Upon this instruction the jury returned a verdict for the defendant. Exceptions were noted and appeal taken. Upon review it was definitely and clearly stated that the instructions were incorrect in point of law. Otherwise, every professional man would be required to possess the highest attainments and to exercise the greatest skill in his profession. Such a requirement would be unreasonable. Exceptions were sustained and new trial granted.

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Illustrative of the law regarding skill and care required of specialists:

Where one holds himself out to be a specialist in Medical and surgical treatment of a particular organ, injury or disease and is employed as such he is bound to have and exercise such skill and knowledge in diagnosis and treatment as is ordinarily possessed by those who in the same general locality, devote special study and attention to the same specialty.

The case involved treatment of an eye injured in an explosion in a railroad accident. Patient was treated by a general practitioner for a week and on being convinced that there was a foreign object in the eye sent him to specialist who casually examined it, treated it for a few days and sent the patient home assuring him that he would be

O.K. But, he grew worse and returned to first doctor who removed a piece of tin an inch long and ½ inch wide. Held that as a matter of law the specialist did not exercise the care required of him in diagnosing and treating this case. A like ruling would surely obtain in connection with the services rendered by a dentist holding himself out as a specialist in a particular field.

Another case illustrating the degree of care and skill required of the professional man is reported in 40 Ill. 209.

Degree of Skill and Care Required in Rendering Professional Service, 40 Ill. 209

The following points of law of interest to us in this connection were decided:

1. The highest degree of care and skill is not required of a physician (and would add by analogy of the dentist) to relieve him of liability from damages resulting from his treatment of a patient, only reasonable care and skill are necessary.
2. If a person holds himself out to the public as a professional man, he must be held to ordinary care and skill in every case of which he assumes charge whether he receives fees or not.
3. Where he is merely asked his opinion as a friend or neighbor and not in his professional capacity then no professional responsibility is incurred.

The case involves an appeal for a physician where in the lower court the jury was instructed that the physician was liable for whatever damage might have accrued to the patient by reason of any want of care and skill on the part of physician. The court of appeals held that such charge to the jury stated the responsibility of the physician too strongly and too broadly as it requires the highest degree of care and skill and where as only reasonable care and skill are necessary.

As regards the skill and care required of a non-professional volunteer the following case is in point:

Matthei v. *Worley*, 69 Ill., App., 654—1897. This point of law was declared: If by treating, operating on, or prescribing for physical ailments a persons holds himself out as a doctor to persons employing him and they believe him to be a doctor he will be chargeable as such.

The suit was against a druggist by a party who went to him with a hurt finger which the druggist treated wrongfully for ten days. The result of it was his inability for a long time to work and finally amputation of the finger. The lower court found for the plaintiff

and held that under the circumstances the defendant was chargeable with the necessity of using the skill and care of a physician. The court of appeals affirmed the judgment of the lower court. If the circumstances had been different, i.e., the druggist had not held himself out as a physician but had merely acted in the capacity of a non-professional volunteer he would not have been liable either criminally or civilly. In rendering this decision the court refers to the same line of reasoning in the case of *McNevins* v. *Low* reported in 40 Ill., 209, which was heard in 1866 and in *Richie* v. *West,* another Illinois case decided in 1860.

A very interesting and significant statement was made by the court in the case of *Ritchie* v. *West,* the Illinois case referred to as having been tried in 1860 and is reported in 23rd Ill. 329. This statement in substance follows: "A professional man undertaking to treat a patient is held to possession and use of skill which is ordinarily used by members of his profession. And whether injury results from want of skill or want of its application, in either case he is equally liable. This, the law implies whenever a *retainer or fee* is shown, but *when the services are rendered as a gratuity, gross negligence* will alone create liability. The point should be stressed, however, that if the physician or dentist is employed in his professional capacity then he is chargeable with reasonable skill, etc. whether he receives a fee or not, but if the services are in the nature of non-professional volunteer, gratuitous services, then he is only liable for his gross negligence.

Very often a patient presents and requests service the wisdom of which is seriously doubted by the dentist. However, the patient persistently insists and the dentist is often in a quandary as to what his course of procedure should be.

The case of *Gramm* v. *Boener,* 56 Ind. 497, 1877, appropriately illustrates a case of this kind. The case involved suit against a surgeon, who, at the request and insistence of the patient, had rebroken and reset an arm and a leg whereby the patient lost the use of the arm and his leg became crooked, deformed, and permanently lame. The lower court gave jury instructions which led to verdict and judgment for the plaintiff for $3,000.00. On appeal the judgment was reversed and a new trial ordered on grounds of improper instruction to the jury. In reversing the lower court, the court of appeals among many other things, had this in substance to say: "It seems to us to be the duty of a surgeon when called upon to perform an operation to advise against it if in his opinion it is unnecessary, unreasonable, or will result in injury to the patient. The patient is entitled to the professional man's judgment whether he asks it or not. If the surgeon proceeds

to the operation without expressing an opinion as to its necessity or propriety, the patient should presume that in the opinion of the surgeon the operation was correct. However, if the surgeon when called upon, advises the patient who is of mature years and sound mind that the operation is improper and unnecessary and the patient still insists, the surgeon finally complies, we do not see upon what principle the surgeon can be held responsible to the patient for damages on grounds that the operation was improper and injurious. In such cases, the patient relies on his own judgment and not upon that of the surgeon and he can not complain.

"It might be observed, however, that if lack of reasonable care and skill in performing the said operation is shown then liability naturally would obtain."

As dental practitioners we are very often faced with possibilities analogous to these mentioned in this case. When we are requested to remove a tooth and we feel that it is unwise to do so, or to place an appliance that might be injurious to the patient, or to render any service, the wisdom of which we seriously doubt, we should at least discuss very fully the improprieties involved and proceed very cautiously if at all.

Malpractice Involving Negligence of Patient Sanderson vs. Hollan, 39 Mo. Appeal 233—1889

This was a suit for damages for injury in poorly treating a child's broken arm. Erysipelas developed and the limb was lost. The defense insisted that the legligence of the parents of the child subsequent to the treatment should bar the right to recover. Evidence was convincing that the treatment in the first instance was improper and the court held that as a matter of law the negligence of the patient following the treatment should not bar recovery but at best should be considered in mitigation of the damages. It was very clearly set forth that such negligence as will constitute a defense must have concurred in producing the injury. Another case was reported in 49 Washington 557—1908 involving negligence of patient. The suit was based on injury to patient's foot through alleged improper use of X-Ray. In discussing the merits of the case the appellate court made these material observations:

(1) Upon conflicting evidence in an action for malpractice in treating a foot by X-Ray, the question of negligence is one for the jury, where there was evidence warranting a finding that the foot was severely burned and the treatment improper and the injury was caused by placing tubes too near and without any shield.

(2) Ignorance as to the effect of X-Ray exposure would be no defense in causing X-Ray burn but rather might make the use of same negligence in itself.

(3) In an action for malpractice such as this is it an error to instruct the jury that the patient could not recover if she quit the treatment before she should have or if she failed to follow the physician's instructions since such acts although adding to the damages did not cooperate in causing the injury nor would they bar the recovery for injury done.

The court in this case quotes from an Oregon case a very clear statement concerning the effect of patients' negligence in a suit for malpractice. The quotation follows:

"The contributory negligence which prevents recovery is that which cooperates in causing the injury—some act or omission concurring with the act or omission of the other party to produce the injury and without which the injury would not have happened; and negligence which has no operation in causing injury but merely adds to the damages resulting is no bar to the action, although it will detract from the damages as a whole."

Surely by analogy, a dental practitioner negligently making an extraction and injuring a patient could not escape liability by showing that the patient did not return for treatment as he directed. Though such failure to cooperate should lessen the damages to be awarded. Negligence of the patient following a negligent act of the practitioner does not discharge the liability, but is simply taken in mitigation of damages.

The same is held in *Du Bois* v. *Decker,* 130 N.Y. 325. *McCracken* v. *Smathers,* 122 N.C. 799, the North Carolina case, involved particularly the patient's failure to return for follow-up treatment. Among the instructions as to law which were given the jury in the case the following are of interest to us.

(1) The care and skill required of a dentist, while not necessarily the highest known to the profession can not be limited to such as is exercised by dentist in his own neighborhood, but must be such as is possessed and practiced by the average of his profession in the *same general neighborhood* or in such given localities or in similar localities. To say one's own neighborhood or town would render the standard of the profession too variable, possibly too low, as the place might contain only one or two dentists whose qualifications might be rather inferior and to prove the ability of each by the standing of the other would be equally unjust to the profession and to the patients.

Instruction No. 2

Where the liability of a dentist for malpractice is established

the fact that the patient after such malpractice disobeyed the instruction of the dentist and so aggravated the injury does not discharge the latter's liability.

As to patient's duty to seek other assistance the case of *Chamberlain* v. *Morgan* is in point. It is reported 68 Pa. 168, and was tried in 1871. The material facts were these:

The patient, Hattie Morgan sued Dr. Chamberlain for malpractice by which her arm that had been dislocated had become stiffened. There was much testimony by the plaintiff as to manner of treatment by defendant. After some time she went to Drs. Halsey and Richardson who diagnosed the dislocation and offered to reduce it. Plaintiff's father said that as long as she was improving so fast he should not have disturbed it. The defendant insisted that by plaintiff's refusal to accept suggestion of Dr. Richardson, he should be relieved or that this negligence should mitigate the damages. The court's observations were in part as follows:

(1) It is incumbent upon an injured party to do whatever he reasonably can to lessen the injury.

(2) In an action against a physician for malpractice to an injured arm he offered to prove by a consulting physician that he proposed to put the patient under an anesthetic and reduce the arm. Held that the offer was properly rejected. Judgment for $300.00, for plaintiff affirmed.

With reference to responsibility for independent acts of professional men, as anesthetist and dentist the following points were made clear in the case of *Nelson* v. *Sandell,* 1926, Iowa Supreme Court, 209 N.W. 440, or 46 American Law Rep. 1447.

1. The mere recommendation of one doctor by another does not render him liable for the other's negligence.

2. A physician is bound to bring to his patient and apply to his case that degree of knowledge, skill, attention and care that is ordinarily possessed and exercised by practitioners under like circumstances and in like localities.

3. Whether or not a physician or dentist exercises the care and skill required of him can not be determined from testimony of laymen or non experts since it is only those learned in the professions who can say what should have been done.

4. A physician's liability for malpractice is not determined by mere failure to effect a cure.

5. A joint employment of a physician and dentist for the extraction of a tooth which will render the physician liable for negligence of the

dentist is not shown by evidence that physician recommended the dentist to perform the operation and agreed to administer the anesthetic and look after the patient's interest.

6. A physician who merely administers an anesthetic to a patient who is operated on by another is generally not liable for the negligence of the practicing surgeon.

This case was much involved and concerned removal by dentist of impaction and the administration of the anesthetic by the doctor. The jaw was fractured. The physician had been treating the patient for neuritis and painful conditions throughout the body which he attributed possibly to an impacted lower 3rd molar. He X-Rayed the region and recommended the patient to a certain dentist for extraction. Arrangements were made and the physician agreed to administer the anesthetic and to look out for the patient generally. The second molar was first removed and in removing the impacted tooth the mandible was fractured. Treatment for the fracture by the two involved several attempts at reduction and wiring and irrigations, in fact, the usual routine treatment was employed over a period of a couple of weeks.

The instant suit was brought jointly against the physician and dentist charging negligence in operating and in removing the tooth. The outcome of the suit was to discharge the physician of liability for the dentist's negligence in the operation, and the case against the dentist was dismissed as being improperly brought as to place.

Malpractice—Professional Man's Responsibility for Negligence of Nurses, Baker vs. Wentworth, 155 Mass. 338-189

This case involves an attempt to charge a surgeon with the negligence of nurses at a hospital where the patient was attended after the operation. The physician was not the proprietor of the hospital and although it was on his advice that this hospital was chosen still it was held that he was not responsible for negligence of nurses in caring for the patient after the operation and thus in spite of the claim that the patient thought it to be the physician's private hospital, since neither he or any one acting for him had made any such representation to that effect.

Ewing v. *Goode,* 78 Federal Report 442 is a case illustrating the following points with respect to malpractice.

1. In order to recover damages from physicians or surgeons for want of proper care and skill the plaintiff must show both that the defendant was unskillful or negligent and that injury was produced by want of his skill or care.

2. Mere lack of skill or negligence without injury gives no right to recover even nominal damages.

3. As to warranty. A physician is not a warrantor of cures in the absence of an express contract to that effect. His implied obligation arising from employment is one that no injury shall result from any want of care or skill on his part.

The case instant involved treatment of eyes of patient over a long period. One eye was operated on several times and was finally lost. Patient sued for malpractice based on lack of skill because he did not effect a cure. No negligence or lack of skill and care was shown. The judge in directing the verdict for defendant stated clearly the above points of law.

Burk v. *Foster,* 114 Ky., page 20, 1902.

Malpractice suit, which was the outgrowth of wrong diagnosis or failure to properly diagnose a dislocated shoulder. The facts were substantially these: On Jan. 31, 1900, plaintiff sustained injury to arm and shoulder by a runaway team, hitched to farm wagon. The arm was fractured and shoulder dislocated. Defendant was called, who diagnosed and successfully treated the fracture. He did not, according to his own admission discover the dislocation and said that it was not then dislocated, but admits he found it dislocated on an examination made after the patient had been discharged. The patient did not know his shoulder was dislocated until more than two months after the injury when a Dr. Stamper upon casual examination one day in a store told him so. He reported this to Dr. Foster who was his first doctor but was told that it was sore and would slowly heal. The suit was brought in August 1900 to recover damages for neglect in failing to discover and correct the dislocated shoulder whereby the plaintiff was permanently injured. In the lower court under error in instruction of the court the jury found for the defendant on appeal the case was remanded for new trial with direction for proper instructions. In giving an opinion on this case the court made several very important observations as to the construction of law in that state in such cases, two of which were in substance as follows:

1. The care and skill required of a physician in treating is not to be measured by that exercised by ordinarily skilled and prudent physicians in that particular locality in treating a like injury, but by such as is exercised generally by physicians of ordinary care and skill in similar communities.

2. The mere fact that the result of a patient's treatment is as good as is usually obtained in like cases similarly situated will not preclude a recovery by the patient against the physician for negligence or lack

of skill, the patient being entitled to the chance for the better results which might come from proper treatment.

The case of Toms v. Aiken reported in 126 Iowa 114, also involved mistake in diagnosis and treatment of dislocation of the clavicle, and the verdict was for the plaintiff. From judgment thereon defendants appealed and obtained a reversal.

The importance of correct diagnosis by the dentist and the recent trend of the attitude towards the legal requirements in this connection are both demonstrated in the two cases reported by Leslie Childs in the 1935 October Cosmos. One case occurred in Nebraska—126 Neb. 629. 253 N.W., 871, and the other came to trial in California in 121 Cal. Opp. 264. Both cases involved extraction of teeth for patients who presented with considerable pathological involvement. There was pain, swelling, rapid pulse, and fever. Injections and extractions were made without proper examination and diagnosis. In both cases ostemylitis and cellulitis followed. The suit in the first case resulted in judgment for the plaintiff of $10,000 which was upheld by the higher court. The result in the second case was also in favor of the plaintiff. It was already set forth in these cases that malpractice may consist of a lack of skill and care in diagnosis as well as in treatment. The detailed facts in these cases are interesting and may be read in either the issue of the Cosmos mentioned or in the Court reports referred to.

The Liability of the Dentist for Infection Following Extraction

A large number of the malpractice cases that the dentist is called upon to defend are the outgrowth of infection and the many complications following extraction. These cases are surprisingly similar as to their facts: Usually the patient presents with badly broken down teeth, possibly hidden roots, and has been suffering intense pain over a period of several days. The teeth are removed and complications follow. The patient is ready to trace back the post-extraction pains, swelling, etc., and charge it to the improper and negligent treatment by the dentist. In cases of this kind the question of what the patient must prove to recover from the dentist, becomes interesting to all of us. Generally speaking, he must allege and prove negligence was the proximate cause of the injury complained of.

The application of the rule of law is appropriately demonstrated in a Wisconsin case reported in 173 Wis. 484, 180 N.W. 821, the abbreviated facts of which follow: The patient presented on Saturday and a badly broken down tooth was removed in two parts. A pus sac was attached to one root but none to the other. The socket was

not curetted, but was washed out with boric acid and swabbed with iodine. The patient returned on Monday with much swelling, socket was washed out and painted with iodine. The patient returned as directed for several treatments. The conditions, however, grew worse and on Wednesday the case was referred to an oral surgeon, who discovered serious infection, curetted the socket, incised deeply, drained, and finally removed seven teeth and a portion of the jaw-bone.

It was claimed in the suit, of course, that the infection was caused by the improper treatment by the dentist. The patient among other things testified that the dentist injected the needle into his lip and without resterilization injected into the gum. This was denied by the dentist. The judgment in the first instance was in favor of the plaintiff for $10,000. A reduction by the court to $4,745.00 was accepted by the patient and an appeal was taken by the dentist to the Supreme Court of Wisconsin. In reviewing the case it was said in substance: The evidence sustained a finding of a lack of reasonable skill and care on the part of the dentist; it was conceded that there was infection in the lower jaw. The question is what caused the infection. In order to recover, plaintiff must produce evidence to justify a finding that it was due to the defendant's negligence. The burden is not met by showing that infection might have been the result of two or more causes, one of which was defendant's unskillful treatment. Judgment was reversed and lower court instructed to dismiss the case.

A Maryland case along the same line and in which the facts are somewhat similar is reported in 137 Md. 227, 112 Atl. 179. The greatly abbreviated facts in this case follow: The plaintiff had a tooth extracted and the dentist failed to remove all the roots. There was post-extraction trouble and after a month or more the patient presents to another dentist, the defendant in this case, and had the roots removed. Following this operation there was considerable hemorrhage, pain, and swelling. The patient had been told to return for treatment if trouble was experienced, but instead, on the day following, the family physician was called in. He discovered necrosis of the bone, and after several days treatment, the patient was hospitalized. In the course of treatment, there was thorough scraping away of all necrotic substance. Finally, two more teeth were extracted and all involved surrounding bone was removed. Without further trouble the patient recovered. Suit followed against the dentist No. 2 who had removed the roots, on the theory that his negligence and unskillfulness caused the injuries suffered. The result in the lower court was judgment for the plaintiff. After a careful review of the evidence and the record, the Court of

Appeals reversed the judgment without even a new trial. It held that plaintiff had failed to prove negligence or unskillfulness on the part of the dentist.

By way of summary in these two cases it may be submitted that the dentist is duty bound to use ordinary care and skill in his work, and in the absence of proof to the contrary he is presumed to have done so. It follows then that in case infection follows dental services rendered the burden is on the patient to show the negligence of dentist and its relation to the injury as the proximate cause.

May we submit further, that while the law in these cases may appear too simple and obvious to waste time on, yet the proper construction of law is not all certain to us, since so many cases must be carried to the Superior Courts for consistent adjudication.

Miscellaneous Considerations

It is hoped that under this subhead it may be interesting and enlightening to review the Oregon State Case which involved the validity of the state law which prohibited advertising in dental practice. The title of the case is Semler v. Oregon State Board of Dental Examiners and is an appeal from the Supreme Court of Oregon. It was argued Match 7, 1935, and was decided April 1, 1935. It is reported in the 294 United States Supreme Court Report, page 608.

In this case the following points were decided:

1. The fact that an exercise of the police power forbidding certain forms of advertising by dentists will interfere with existing contracts for display signs and press notices does not touch the validity of the regulations.

2. A regulation of dentist is not invalid as to them because it does not extend to the other professional classes.

3. A regulation preventing dentists from advertising their professional superiority and their prices; from use of certain forms of advertising signs; from use of advertising solicitors or publicity agents; from advertising free dental work, free examinations, guaranteed work and painless operations, held valid under due process clause of 14th Amendment, without regard to the truthfulness of the representations or the benefit of the services advertised.

4. It is within the authority of the state to estimate the baleful effects of such advertising and to protect the community not only against deception but against practices which, though they may be free from deception in particular instances, tend nevertheless to lower the standards of and to demoralize the profession.

Chief Justice Hughes delivered the opinion of the court in this

case and it is hoped that many of you will find time to read it carefully at an early date, because in so doing I feel that the reaction will be a wholesome one on the attitude of the reader towards dentistry as a profession.

Previous legislation had provided for the revocation of dental licenses for unprofessional conduct, which as then defined included advertising of an untruthful and misleading nature. The Act of 1933 amended the definition so as to provide as quoted above, additional grounds for revocation.

Oregon Case

The plaintiff Dr. Semler sought to enjoin the State Board from enforcing the law on the grounds of unconstitutionality. The Circuit Court ruled against the Doctor, the State Supreme Court sustained the Circuit Court and finally the case came on appeal to the U.S. Supreme Court where it was affirmed.

Excerpts from the opinion follow: (1) Plaintiff is not entitled to complain of interference with contracts he describes if the regulation is not an unreasonable exercise of the protective power of the State; (2) The State was not bound to deal alike with all classes or to strike at all evils at the same time in the same way; (3) We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition in the market places. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of relief from pain. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.

It should be heartening in the extreme to know that the highest court in the land assumes this attitude toward the services we render our various communities.

Cases: *Watson* v. *Maryland,* 218 U.S. 173, 179
Dr. Bloom, Dentist, Inc. v. *Cruise,* 228 U.S., 588
Graves v. *Minn.,* 272 U.S., 425; *Dent.* v. *W.Va.,* 129 U.S. 114
Mills v. *State Board,* 90 Colo. 193
Booth v. *Illinois,* 184 U.S. 425

Owner of X-Ray Plates

A very vexing problem very often occurs with reference to the ownership of X-Ray films. From an editorial in the Central Law Journal Volume 95, page 133, we take this comment on the subject: There is an interesting discussion of this subject in the Journal of the American Medical Association for October 1, 1921, page 1121. It is there said that this question has never been passed on by a court of last resort. The writer goes on to say: "The patient goes to the physician, primarily for a diagnosis of his condition and for such treatment as may be indicated. The physician makes an examination of which the taking of roentgenograms is a part. If the pictures are made by the physician himself then they are a part of his records of the case. If taken by the roentgenologist then the report to the physician perhaps accompanied by the prints of the negative is a part of the clinical record. The diagnosis is based upon the examination and the clinical record. The patient pays for the opinion and the treatment, not the means by which they were determined. He does not pay for the plates any more than he does for the apparatus. In the absence of any special agreement, the patient has no legal right to the X-Ray plates.

Close reflection upon the various cases submitted brings us to the sober realization, I believe, that while the abstract law covering our duties and rights as professional men may remain the same, the construction, interpretation, and application of these basic principles have varied and are subject to vary according to time, place, the temper of the communities and the temperament of the juries and judges. It behooves us, therefore, to know of our legal duties and rights as thoroughly as possible; to be careful to reasonably discharge our duties at all times; and to be ready to defend our rights to the last "ditch," either through individual or organized effort.

References:—

Dental Jurisprudence, Wm. F. Rehfuss
Dental Jurisprudence, Elmer D. Brothers
Law for the Dentist, Leslie Childs
Ethics and Jurisprudence for the Dentists, Noyes
Case references cited.

All Together Men. Let's Go. The National Dental Association Meeting is August 10, 11, 12, 13, at Washington, D. C.